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Division II
State of Washington
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No. 50530-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JAMES LAFONTAINE, Appellant.

Appeal from the Superior Court of Grays Harbor County
The Honorable David Edwards
No. 17-1-00123-9

**BRIEF OF APPELLANT
JAMES LAFONTAINE**

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I. ASSIGNMENTS OF ERROR

1. Defense counsel's failure to properly investigate and present a mental health or voluntary intoxication defense, was error.
2. The court's imposition of \$200 costs and \$100 DNA fee, when client was unable to pay and has a mental health condition, was error.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is defense counsel ineffective when counsel fails to investigate a mental health or voluntary intoxication defense when there is a record of a long history of mental health issues, the defendant behaved oddly at the time of the incident and after the arrest, there is indication that defendant may have consumed drugs, and the defendant was not taking anti-psychotic medication at the time of the incident?
2. Is defense counsel ineffective when he attempts to argue lack of intent based on mental health or drug use, but fails to call known witnesses who can testify regarding defendant's mental health and possible drug use?
3. May a sentencing court impose legal financial obligations,

other than restitution and the crime victim penalty assessment, when the defendant suffers from a mental health condition and does not have the ability to pay?

III. STATEMENT OF THE CASE

LaFontaine was convicted of assault in the third degree after a jury trial. RP 5-23-17 at 43. He appeals his conviction.

1. Allegations.

LaFontaine was charged with one count of assault in the third degree on March 2, 2017. CP 1. The allegations were that an unknown person was hitting the front door and walls of a home. CP 4. LaFontaine was later contacted by police a half block away from the home where he started kicking the police car's bumper. CP 4. When asked what he was doing, he responded, "Are you serious right now?," "Are you serious right now?," and "Well I'm just making some noise." CP 4. Then, LaFontaine approached the officer and kicked him. CP 4.

2. Competency Evaluation.

On April 10, 2017, a RCW 10.77 competency order was signed. CP 13-19. LaFontaine was diagnosed with "psychotic disorder not otherwise specified." CP 21.

The competency evaluation discussed LaFontaine's history of mental illness. In 2004, LaFontaine was hospitalized on a 72-hour hold in

Kitsap County when he was 16 years old. CP 24. He was released on a 90-day Less Restrictive Alternative (LRA) order. CP 24. At that time, he was diagnosed with anxiety and depression. CP 24.

LaFontaine has a long history of receiving mental health services in the community. From 2003 to 2005, he received services at Kitsap Mental Health and was diagnosed with major depressive disorder. CP 24. From 2009 to 2016, he received services at Grays Harbor Crisis Clinic and Behavioral Health Resources and was diagnosed with hyperkinetic syndrome unspecified, depressive disorder, unspecified psychoactive substance use with unspecified psychoactive substance-induced disorder, and other psychoactive substance dependence, uncomplicated, as well as drug dependence and personality disorders. CP 24. LaFontaine also self-reported being prescribed anti-psychotics and anti-depressants by SeaMar. CP 24. He was not taking medication at the time of the incident. CP 22.

In 2016, LaFontaine had been evaluated by Western State Hospital (WSH) for competency. CP 24. At that time, LaFontaine described some paranoia, that people on television talked to him, that he believed he could be observed through television screens, and some other delusions. CP 24-25. Prior to that evaluation, LaFontaine had told his mother that he was in charge of ISIS, had electrodes in his teeth, and that his children's heads were flying through walls. CP 25. He was diagnosed with unspecified

psychosis and found competent. CP 25.

LaFontaine was arrested on this case on March 1, 2017. CP 25. Jail staff described his behavior as “off the wall.” CP 25. The nurse thought he had ingested bath salts. CP 25. A corrections officer described LaFontaine standing naked on a toilet and jumping off in a Ninja-like manner. CP 25. Both described that his behavior had improved since his arrest, but he was still “odd.” CP 25.

On April 14, 2017, after the incident in this case, LaFontaine was seen by Grays Harbor County Crisis Clinic Columbia Wellness. CP 24. At that time, he was experiencing auditory and visual hallucinations, his eye contact and speech patterns were odd, “Like he was on a different plane,” his eye contact was intense, he had a trash-can liner with a Chiquita banana sticker tied around his head, and he requested being evaluated for psychiatric medicine by a jail doctor. CP 24.

On April 20, 2017, approximately seven weeks after the incident in this case, LaFontaine was evaluated for competency. CP 22. At that time, the evaluator found that although LaFontaine suffered from a mental illness and displayed odd behavior, he was competent. CP 21, 28. The evaluation was limited to an opinion on competency. There was no discussion of the incident in this case. CP 22. And, no opinion given as to diminished capacity or sanity at the time of the incident. CP 21-29. On

May 1, 2017, the court signed an order finding LaFontaine competent. CP 31-32. Trial commenced three weeks later, on May 23, 2017.

3. Trial.

On March 1, 2017, police responded to a report of someone knocking on the wall and door of a house, causing a disturbance. RP 5-23-17 at 13. Police contacted LaFontaine half a block down the street. RP 5-23-17 at 14. LaFontaine began kicking the bumper of the patrol car. RP 5-23-17 at 16. The officer asked him what was going on and LaFontaine started acting irrational and loud and said, “Are you serious?” RP 5-23-17 at 16. Then, LaFontaine said, “I’m just making some noise,” and rapidly approached the officer and kicked the officer in the shin. RP 5-23-17 at 16-17. LaFontaine was cooperative while being arrested, but continued to act irrational and make strange statements. RP 5-23-17 at 18, 24. The officer asked LaFontaine why he kicked the officer and he said “I arrested myself” and something about the officer having a rubber band on his dick or balls right now. RP 5-23-17 at 24.

Defense counsel asked the officer about his training in detecting people suffering from mental health symptoms and those under the influence of drugs. RP 5-23-17 at 20. The officer testified that he is trained to look for those issues. RP 5-23-17 at 20. Defense counsel asked the officer if it was possible that LaFontaine was under the influence of

drugs; the officer testified that it was possible. RP 5-23-17 at 25.

A second officer also responded. RP 5-23-17 at 28. He testified that LaFontaine made more irrational statements after he was arrested and that the whole incident was “bizarre.” RP 5-23-17 at 33.

Defense counsel did not ask any other questions about LaFontaine’s mental condition and did not call any witnesses.

During closing arguments, defense counsel argued that LaFontaine did not intentionally assault the officer because he wasn’t in his right mind due to mental illness or drugs. RP 5-23-17 at 38. The State argued there was no evidence that LaFontaine was suffering from a mental illness or under the influence of drugs. RP 5-23-17 at 40-41. LaFontaine was found guilty. RP 5-23-17 at 43.

4. Sentencing.

At sentencing, the court inquired into LaFontaine’s ability to pay and then waived all non-mandatory fines. RP 6-5-17 at 6. The court did impose a \$500 crime victim penalty assessment, \$200 in court costs, and \$100 DNA fee. CP 71.

IV. ARGUMENT

1. LaFontaine Received Ineffective Assistance of Counsel Because His Attorney Did Not Retain An Expert or Pursue a Mental Health or Voluntary Intoxication Defense.

a. *Counsel Did Not Properly Investigate or Present a Mental Health or Voluntary Intoxication Defense.*

Every defendant has a right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I § 22. To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). Ineffective assistance of counsel claims are reviewed de novo as they present mixed questions of law and fact. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

“Because ‘[e]ffective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial,’ an attorney's failure to adequately investigate the merits of the State's case and possible defenses may constitute deficient performance.” *State v. Fedoruk*, 184 Wash. App. 866, 880–81, 339 P.3d

233, 239–40 (2014), quoting *A.N.J.*, 168 Wash.2d at 111, 225 P.3d 956. Generally courts will not find counsel ineffective for “strategic choices made after thorough investigation of law and facts relevant to plausible options.” *Strickland*, 466 U.S. at 690–91. However, counsel may be ineffective when they makes strategic choices “after less than complete investigation.” *Id.* With respect to the need for expert testimony, our Supreme Court has adopted the approach set forth by the Ninth Circuit Court of Appeals:

Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert.

In re Pers. Restraint of Brett, 142 Wash.2d 868, 881, 16 P.3d 601 (2001), quoting *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir.1999)).

Failure to retain a mental health expert and explore a mental health defense can constitute ineffective assistance of counsel. *Fedoruk*, 184 Wash. App. at 871; *Brett*, 142 Wash.2d 868. In *Fedoruk*, the defendant had a long history of mental illness, including medication and hospitalizations. *Id.* at 871. Police contacted the defendant based on calls that the he was engaging in strange behavior. *Id.* at 872. Police located a body and arrested the defendant; he made strange statements to the police, and was ultimately charged with murder. *Id.* at 873-74. During the

pendency of the case he exhibited mental health issues and was forcibly medicated. *Id.* A competency evaluation was done and he was found competent. *Id.* at 875. Defense counsel did not obtain any expert or give notice of an affirmative defense. *Id.*

The State moved to exclude any evidence of Fedoruk's mental illness. *Id.* Defense counsel argued that they were not presenting a mental health defense, but should be able to introduce evidence of mental illness with regard to intent. *Id.* at 875-76. The court excluded any evidence of mental disease or defect or diminished capacity and declined to give a diminished capacity instruction. *Id.* at 876. Five days later, defense counsel moved for a continuance to pursue a not guilty by reason of insanity (NGRI) defense, arguing that he did not believe there was a legal basis to pursue an NGRI defense previously. *Id.* The State acknowledged there was a basis for such defense, but objected the continuance because defense counsel was aware of the mental health concerns previously. *Id.* The court denied the continuance. *Id.* at 876-77. The court found that counsel was ineffective for failing to retain an expert. *Id.* at 822.

In this case, counsel was aware that LaFontaine had a history of mental health issues since he was a juvenile, had been prescribed anti-psychotics, was not taking medication at the time of the incident, and that he was experiencing auditory and visual hallucinations. The record is

unclear whether or not counsel ever retained an independent expert. There is no record of requesting authorization for payment for any expert. It is clear from the record that defense counsel attempted to argue that LaFontaine did not intentionally assault the officer due to his mental health and/or being under the influence. However, counsel did not call any witnesses to testify as to LaFontaine's mental health. Presumably, if counsel had retained an expert, that person would have been called as a witness. Also, given that trial commenced three weeks after LaFontaine was found competent, it is unlikely that an expert could have been retained, met with LaFontaine, and given counsel an opinion in such a short time frame.

Furthermore, counsel did not call any other witnesses to establish LaFontaine's mental illness and symptoms. Counsel was aware that LaFontaine acted strangely in the jail and that jail staff suspected he may be under the influence of drugs and suffering from mental illness; no jail staff were called as witnesses. Counsel was aware that a competency evaluation was done and that LaFontaine was diagnosed with "psychotic disorder not otherwise specified," had a long history of mental illness, was experiencing hallucinations, and that he was not on medication at the time of the incident; the evaluator was not called as a witness. The failure to call these witnesses, where the entire defense theory was that the assault

was not intentional due to mental illness and/or voluntary intoxication, was unreasonable and clearly prejudiced LaFontaine.

b. *Prejudice.*

“To merit reversal based on an ineffective assistance claim, a defendant has the burden to show a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different.” *Fedoruk*, 184 Wash. App. at 884, quoting *State v. Thomas*, 109 Wash.2d 222, 226, 743 P.2d 816 (1987). Under this test, the defendant “need not show that counsel's deficient conduct more likely than not altered the outcome in the case,’ but must demonstrate a probability of a more favorable result ‘sufficient to undermine confidence in the outcome’ actually obtained.” *Id.*, quoting *Strickland*, 466 U.S. at 693–94.

In *Fedoruk*, like here, the defendant was evaluated for competency only. *Id.* at 884-85. The expert, in *Fedoruk* and here, found the defendant competent at the time of the evaluation. *Id.* at 885. However, the expert did not evaluate the defendant for diminished capacity or sanity at the time of the offense. *Id.*; cf *State v. Turner*, 143 Wash.2d 715, 730, 23 P.3d 499 (2001) (not ineffective where defendant was evaluated and found legally sane at the time of the offense). In *Fedoruk* and this case, there was a long history of documented mental illness and odd behavior at the time of the incident. *Id.* Based on the record in this case, which is very similar to

Fedoruk, if counsel had retained an expert, adequately investigated a mental health or voluntary intoxication defense, or called the known witnesses that could testify regarding LaFontaine's mental illness, possible intoxication, and odd behavior at the time of, and immediately after, the incident, there would likely have been a more favorable outcome. Therefore, LaFontaine was prejudiced and the conviction should be reversed and the matter remanded for a new trial.

2. The Trial Court Should Not Have Imposed the Legal Financial Obligations Because LaFontaine Is Unable to Pay and Suffers From a Mental Health Condition.

The trial court is required to determine if a defendant suffering from a mental illness has the means to pay, other than restitution and CVPA, before imposing other legal financial obligations.

(1) Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.

(2) For the purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

9.94A.777.

The statute clearly states a judge *must* determine that a defendant who suffers from a mental health condition has the means to pay before imposing legal financial obligations. And, a defendant suffers from a mental health condition when there is a history of involuntary hospitalization or an expert opinion.

In this case, the court did a *Blazina*¹ inquiry and then waived all non-mandatory legal financial obligations (LFO's). RP 6-5-17 at 6. However, the court did impose the \$500 CVPA, \$200 costs, and 100 DNA. The court should have waived the \$200 costs and \$100 DNA under RCW 9.94A.777 due to LaFontaine's mental health condition.

LaFontaine clearly has a mental health condition. A competency evaluation had been ordered. The evaluation had been filed with the court and the court must have reviewed the evaluation prior to entering an order finding LaFontaine competent. Therefore, the court was aware that LaFontaine had previously been involuntarily hospitalized and suffered from a mental health condition². The court erred by imposing the \$200

¹ *State v. Blazina*, 182 Wash. 2d 827, 344 P.3d 680 (2015).

² Division III recently held that the court would not review a trial court's failure to inquire into a defendant's ability to pay when counsel had not raised mental health at sentencing. *See State v. Catling*, -- Wn. App. --, 34852-1, (Div III, Mar. 15, 2018). However, in this case, unlike *Catling*, there was a record of LaFontaine's mental health condition and the court was aware of the mental health condition. Therefore, the court should have inquired.

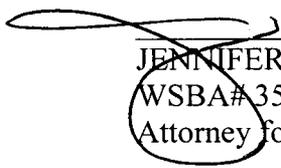
costs and \$100 DNA fee. This court should reverse the imposition of those fees due to LaFontaine's mental health condition and inability to pay. In the alternative, if this court doesn't find that the record clearly establishes a mental health condition and the inability to pay, this court should remand for a hearing to determine whether LaFontaine has a mental health condition and the ability to pay.

V. CONCLUSION

In conclusion, LaFontaine received ineffective assistance of counsel because his counsel failed to investigate and prepare for a mental health or voluntary intoxication defense. Therefore, this court should reverse and remand for a new trial. In addition, the court erred by imposing the \$200 costs and \$100 DNA when LaFontaine suffered from a mental health condition and did not have the ability to pay. Therefore, those legal financial obligations should be reversed; or, in the alternative, remanded for a hearing regarding the LFO's.

Dated this 28th day of March, 2018.

Respectfully Submitted,



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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 50530-4-II
vs.)	
)	CERTIFICATE OF SERVICE
JAMES LAFONTAINE,)	
)	
Appellant.)	
)	

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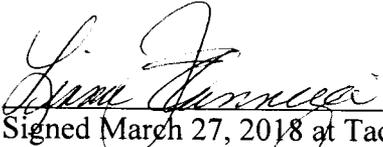
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